UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOWARD INDUSTRIES, INC.		
and		Case 15-CA-164449
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1317		

UNION'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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COMES NOW Roger Doolittle, Counsel for the International Brotherhood of Electrical Workers, Local 1317 (Union), in the above captioned case, and files this Brief in Support of Exceptions to the Administrative Law Judge's (ALJ) Decision and Order (ALJD) in the above-captioned case. [1]

I. FACTS

The facts of this case are as outlined in Section II, subsections A through D of the ALJD. (ALJD, pgs 2-6).

II. LEGAL ANALYSIS

A. The Issuance of Certificates for Hams to Employees Constituted a Term and Condition of Employment.

As noted in Exception No. 1, the ALJ erroneously failed to definitely find that the "Christmas hams are part of the remuneration that employees receive for their work, and thus are subject to the mandatory duty to bargain."

[1] Reference to the Exhibits of the General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number or numbers for those exhibits. The Joint Exhibits of General Counsel and Respondent will be designated as "JX".

An employer is prohibited from making changes to mandatory subjects of bargaining, such as wages, work hours, or other terms and conditions of employment, without affording the exclusive bargaining representative an opportunity to bargain. Flambeau Airmold Corp., 334 NLRB 165 (2001).

Calling a payment or award a "gift" does not exempt it from the duty to bargain.[2] "[W]here so-called gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of it," they are terms and conditions of employment. NLRB v. Elec. Steam Radiator Corp., 321 F.2d 733, 736-37 (6th Cir. 1963). In determining whether a policy is a term and condition of employment, the Board considers whether it is a "reasonable expectancy of the employment relationship." Deaconess Medical Center, 341 NLRB 589, 593 (2004), *citing* Liberty Telephone & Communications Inc., 204 NLRB 317 (1973); *see also* Waxie Sanitary Supply, at 304 ("A holiday bonus is a mandatory bargaining subject if the employer's conduct raises the employees' reasonable expectation that the bonus will be paid").

The Board has also recognized that parties may adopt a policy that becomes "so integrated into the bargaining relationship" that the employer may not change the policy without bargaining with the union. Owens-Corning Fiberglas, 282 NLRB 609, 613 (1987) (a program from which employees received a benefit for over 25 years constituted a term of employment).

In this case, the certificates to purchase hams during the Christmas season are both terms and conditions of employment and mandatory subjects of bargaining. On December 13, 2006, the Employer promulgated a policy covering the distribution of certificates to employees during Christmas time to purchase hams. (Joint Exhibit A). Thereafter, that is, until Respondent enacted

[2] The Board recognizes that "gifts" that "are in fact not compensation for services" are not terms or conditions of employment. "[A]n employer can make or withhold such payments as he pleases." NLRB v. Elec. Steam Radiator Corp., 321 F.2d 733, 736-37 (6th Cir. 1963); *see also* Benchmark Industries, 270 NLRB 22 (1984). However, a gift or bonus can be a term of employment regardless of whether it is based on employee performance. Waxie Sanitary Supply, 337 NLRB 303, 305 (2001).

its unilateral change to this policy on November 17, 2015, Respondent distributed certificates for hams to each employee every year at Christmas time, so that every employee came to expect these ham certificates every year as a part of their employment. Therefore, because these ham certificates were a "reasonable expectancy of the employment relationship," they became a mandatory subject of bargaining. Deaconess, 341 NLRB at 593; Waxie Sanitary Supply, 337 NLRB at 304. In addition, because the Christmas gift policy became so ingrained in the bargaining relationship, Respondent could not change the policy without first bargaining with the Union. Owens-Corning Fiberglass, 282 NLRB at 613.

Thereafter, in order to avoid litigation regarding the December 13, 2006 policy and other similar policies, the Union and the Respondent negotiated and incorporated into the collective bargaining agreement Article XXI, Section 1. (Joint Exhibit D). Article XXI, Section 1 established the procedures for bargaining over changes to the December 13, 2006 policy and any other written policy. Because the Respondent and Union negotiated and agreed to include in the collective bargaining agreement a process for making mid-contract changes to the December 13, 2006 policy, the policy regarding gifts of certificates to purchase hams during the Christmas season became a term and condition of employment. Thus, a Christmas ham from Respondent has become so integrated into the employees' expectations from Respondent that it is a term of their employment. Owens-Corning Fiberglas, 282 NLRB at 613.

B. Respondent's November 6, 2015, *Email to the Union* Failed to Give Clear and Unequivocal Notice of the Proposed Policy Change

As noted in Exceptions 2-5, the ALJ erroneously determined the Union received proper Notice from Respondent and dismissed the CNOH.

(1) Inadequate Notice

The undisputed evidence is "that it was Respondent who attempted to initiate bargaining over its Company Gifts to Employees policy by invoking Section 1 of Article XXI of the collective-bargaining agreement." (ALJD, p. 7, fn 5). It is also undisputed that the November 6, 2015, Notice Respondent sent to the Union listed the wrong policy that Respondent wanted to cancel. (GC Exhibit C). Thereafter, on November 17, 2015, Respondent cancelled the December 13, 2006 Christmas Gifts Policy and implemented the policy noted its November 6, 2015 email. However, the Union did not have adequate notice the November 6, 2015 policy would replace the December 13, 2006, policy regarding the issuance of certificates for hams.

The Board has consistently held that notice given of a proposed change must be sufficient to give the union a "meaningful opportunity to bargain." Haddon Craftsman, Inc., 300 NLRB 789, 790 (1990). The notice of the proposed changes must also adequately set forth what the changes involve. In re EIS Brake Parts, 331 NLRB No. 195, 47 (2000), *citing* GRH Energy Corp., 294 NLRB 1011 (1989); Gratiot Community Hospital, 51 F.3d at 1260 (union has no duty to request bargaining over a proposed change until it receives "clear and unequivocal" notice).

Here, the only "notice" the Respondent gave the Union was the November 6, 2015 email, which failed to state that it was changing and/or superseding the December 13, 2006 Christmas Gifts policy. The November 6, 2015 email and its flawed attachment failed to satisfy the requirement of being "clear and unequivocal" notice of the proposed change for two reasons. First, the description of the policy sent on November 6, 2015, gave no indication it was related to the distribution of hams to employees at Christmas. The attachment's subject was generally described as, "Company Gifts to Employees" and stated it regarded the "Issuance of gifts by the Company to active employees and certain retired employees of Howard Industries, Inc." (Joint Exhibit C). Nowhere in the attached policy or in the November 6, 2015 email is there any

mention of the words "ham" or "Christmas." (Joint Exhibit B4). Notably, the pre-existing policy, dated December 13, 2006, was titled "Christmas Gifts," and explicitly stated it concerned the "Issuance of Christmas gifts," and referred to "Christmas gifts of hams." (Joint Exhibit A). Given that the December 13, 2006, policy explicitly addressed Christmas hams, but neither the attached "gift" policy emailed to the Union on November 6, 2015, nor the email itself makes any mention of Christmas or hams, the November 6, 2015, communication from the Respondent to the Union did not provide the Union with clear and unequivocal notice that Respondent was amending and/or superseding the December 13, 2006 Christmas Gifts Policy.

Second, Respondent's attachment to the November 6, 2015 email, also contained a fatal error that prevented it from giving the Union proper notice. The attachment attached to Respondent's email did not correctly state which policy it was superseding. Instead, the attachment stated it superseded a policy dated December 17, 2014. (Joint Exhibit C). Respondent admits that a December 17, 2014, policy does not exist. (Joint Exhibit B5)

The Respondent recognized this error and attempted to correct it when it sent a corrected policy to the Union by email on November 30, 2015. (Joint Exhibit B5 and Joint Exhibit E). The policy document sent on November 30, 2015, states that Respondent desires to supersede the policy dated December 13, 2006. (Joint Exhibit E). However, this November 30, 2015, email was too late; the Respondent had already implemented the change on November 17, 2016, and had refused to bargain with the Union over the change. (Joint Exhibits G[3] & B2).

(2) Absence of Waiver

The Board has made clear that, when contract negotiations are not in progress, a union waives its statutory right to bargain over a change in the unit employees' terms and conditions of

[3] Although the Index of Exhibits identifies Exhibit G as the November 17, 2015 email from Loren Koski to numerous parties at Howard Industries containing the subject line "Company Gifts to Employees," the actual Exhibit is erroneously marked as Exhibit H. The Exhibit marked as Exhibit H should be marked as Exhibit G.

employment on the basis of the union's failure to request bargaining only if the union had: (1) clear and unequivocal notice of the proposed change; and (2) was given that notice sufficiently in advance of implementation to permit meaningful bargaining. Bottom Line Enterprises, 302 NLRB 373 (1991); Clarkwood Corp., 233 NLRB 1172 (1977). A union only waives its statutory right to bargain when it does so clearly and unmistakably. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, (1983).

In the instant case, the Union did not waive its right to bargain about this mandatory subject of bargaining. The Union did not receive a sufficient, clear and unequivocal notice of the proposed change to the Christmas ham policy; therefore, the Union did not fail to demand bargaining on the issue, nor did its actions constitute a conscious relinquishment of its right to bargain over the matter. In re EIS Brake Parts, 331 NLRB No. 195, 47 (2000); Triple A Fire, 315 NLRB No. 55, 11 (1994); YHA, Inc. v. NLRB, 2 F.3d 168 (6th Cir. 1993); Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982)(the union was faced with a fait accompli because it did not receive clear and unequivocal notice of a policy change until after employer implemented it).

> The Board has long recognized that where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli. Id.

Because the November 6, 2015, communication from the Respondent to the Union failed to clearly describe with any specificity the policy change and also incorrectly stated which existing policy it would supersede, Respondent did not provide clear and unequivocal notice of the change to the Union before implementing the change on November 17, 2015. Accordingly,

when the Respondent implemented the change on November 17, 2015, and refused to bargain with the Union, the Union was faced with a fait accompli, and Respondent enacted a unilateral change in violation of 8(a)(5) of the Act.

Contrary to ALJ Carter's decision, there is no burden on the Union to infer the meaning from a vague notice from the Employer. Nor is there a duty on the Union to ask the Employer for clarification when such a notice is unclear. Instead, Board law is quite direct in establishing that the Employer's must provide "clear and unequivocal" notice to the Union. Because the Employer's email to the Union failed to provide the "clear and unequivocal" notice legally required, ALJ Carter erred in concluding the Employer did not violate the Act.

III. CONCLUSION

The Union submits that Respondent violated Section 8(a)(5) of the Act when it changed which employees were given certificates for hams by Respondent during the Christmas season in violation of the December 13, 2006 Christmas Gifts Policy. Therefore, the ALJ erred in finding Respondent's notice to the Union was clear and unequivocal and dismissing the CNOH.

Dated at Jackson, Mississippi this 21st day of October 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I electronically filed a copy of the foregoing Union's Brief In Support of Exceptions to the Administrative Law Judge's Decision and Order with the National Labor Relations Board forwarded a copy as indicated below:

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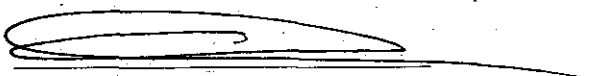

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